

STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES

WASTE MANAGEMENT COUNCIL

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APR 07 2006

APPEAL OF:
Dr. RAE BARNHISEL
IN RE: GROUNDWATER MANAGEMENT PERMIT No. 199103027-T-001

DOCKET No. 05-20 WMC

MEMORANDUM IN OPPOSITION TO THE APPELLANT, Dr. RAE BARNHISEL

NOW COMES, the Intervenor, Town of Temple (hereinafter "Temple"), by and through their attorneys, Cook and Molan, PA and files this Memorandum in Opposition to the Appeal of Dr. Rae Barnhisel and states in support thereof as follows:

I. INTRODUCTION

This is an appeal by the Appellant, Dr. Rae Barnhisel (hereinafter "Barnhisel") seeking to delete the monitoring and sampling requirements for groundwater contained in condition seven of the Groundwater Management Permit issued to Temple; to delete the requirement of installing a new monitoring well contained in condition twelve of the Groundwater Management Permit issued to Temple; and an order requiring Temple to decommission all of the existing monitoring wells at the affected site.

By way of background, the New Hampshire Department of Environmental Services (hereinafter "DES") issued Temple a Groundwater Management Permit with respect to an old municipal burn dump, which was closed and covered in 1979. Temple obtained the Ground Water Management Permit following its own investigation into the groundwater at the site in 2001, with subsequent groundwater sampling in 2002 and 2004, indicating violations of ambient groundwater quality standards for manganese and occasionally lead.

Following these tests, at DES' request, Temple commissioned a site investigation, which included the recommendation that a Groundwater Management Permit be obtained along with the installation of three new monitoring wells. Two of these monitoring wells were designed to substitute or replace existing wells, which were deemed to be ineffective at monitoring groundwater.

Temple lawfully obtained a Groundwater Management Permit by fulfilling the requirements specified in Env-WM 1403.13, thus, Barnhisel's appeal must fail. In addition, Barnhisel's appeal should not be heard because she lacks appropriate standing to present this matter before the council.

II. DISCUSSION

A. Standing

Env-WMC 204.02 (b) (5) requires an Appellant to establish that they have standing. In particular, it requires that the Appellant demonstrate that they will suffer a direct and adverse affect as a result of the decision in a way that is greater than the general public. This matter has been more particularly stated as, "no individual or individuals has standing to appeal when the alleged injury caused by an administrative agency's action affects the public in general, particularly when the affected public interest is represented by an authorized official or agent of the state." Appeal of Richards, 134 NH 148, 156 (1991). In the appeal at hand, Barnhisel is no differently situated than any other member of the public. She has not been harmed by the contamination from the landfill site; she does not abut the landfill site; and has otherwise suffered no harm.

The evidence demonstrates that Barnhisel has not been affected by the landfill, as her own tests of her well do not show any violation of ambient groundwater quality standards. The hydrogeology of the area also indicates that her property is upgradient from the site, further reducing any likelihood that she would be affected by the release of the Groundwater Management Permit. Simply put, speculative harm does not give one standing any more than any other member of the public.

With respect to Barnhisel's contention that her status as a member of the Planning Board and Budget Committee in the Town of Temple provide her authority to file this appeal is simply false. Neither the Planning Board nor the Budget Committee has authorized her to act on their behalf. In addition, the Selectmen are the only body authorized to control litigation in the Town form of government, and not the Planning Board or the Budget Committee.

Finally, Barnhisel's status as a doctor of philosophy, whether it be aquatic sciences or otherwise, does not establish any injury or other basis for granting her status to bring this appeal.

On this basis alone, Barnhisel's appeal should be dismissed.

B. The Burden of Proof

Barnhisel bears the burden of proving, by a preponderance of the evidence that DES' issuance of the Groundwater Management Permit is contrary to case law, statute or rule; or is otherwise arbitrary and capricious. *Env-WMC 205.14 (a)*. Nowhere in Barnhisel's appeal does she specify the manner in which Temple fails to meet or DES failed to evaluate and analyze the requirements of Env-WM 1403.13 with respect to issuance of the Groundwater Management Permit.

Rather, Barnhisel's sole focus is on four monitoring wells that were installed by Temple of its own accord in 2001. The wells were installed in 2001 in order to evaluate the advisability of a proposed subdivision of land in the vicinity of the landfill. Such a study did not require Temple to meet state standards for the installation of monitoring wells. The deficiencies in the installation of these four wells are noted in a letter from the United States Environmental Protection Agency (hereinafter "EPA") dated November 1, 2001¹ and a letter from the DES dated November 14, 2001. Barnhisel contends that because these wells were not installed in accordance with State standards, they do not provide useful information with respect to groundwater conditions. Barnhisel further contends that the information provided by these wells is misleading, by deceiving the general public that the groundwater is being properly monitored. For these reasons, Barnhisel believes the existing monitoring wells should be decommissioned. Barnhisel also complains that the Groundwater Management Permit is deficient because it does not specify that new monitoring wells be installed at a sufficient depth to measure groundwater and the decommissioned wells be decommissioned in accordance with Env-WM 1403.27.

It should be noted at the outset that Groundwater Management Permit's condition six advises the permit holder that the Department reserves the right to require further compliance with Env-WM 1403 if it receives information indicating the need for such work. Thus, work performed by Temple pursuant to the Groundwater Management Permit must comply with state regulations or it will need to be corrected.

¹ EPA and DES both acknowledge that EPA has no jurisdiction over this matter, since it involves a landfill closed prior to 1981.

Barnhisel's complaint appears to overlook the requirements of DES in the June 24, 2004 letter to Temple, requiring the decommissioning of wells B1 and B3 installed by Stratex, LLC and orders replacement monitoring wells be installed in accordance with DES regulations. The same letter also orders the decommissioning of wells B1 and B3 in accordance with DES regulations. Temple has performed all of these tasks in accordance with DES regulations.

Barnhisel contends that the monitoring wells are too shallow to provide data useful to nearby residents. The purpose of installing groundwater monitoring wells and sampling is not to provide data useful to nearby residents, but to DES. This is the reason condition seven of the Groundwater Management Permit requires the monitoring be reported to DES which is consistent with Env-WM 1403.15. Env-WM 1403 does not require information be provided or produced for the benefit of nearby residents.²

With respect to Barnhisel's contention that the new monitoring wells are insufficient to measure groundwater, she ignores the definition contained in Env-WM 1403.02 (k), which defines groundwater as, "subsurface water that occurs beneath the water table and soils in geologic formations". The drilling logs, as well as sampling and gauging data collected by Temple's engineers clearly demonstrate the wells extend below the water table and are in contact with soils and geological formations. As long as the wells are in contact with water beneath the water table and soil in a geologic formation, it is considered groundwater within DES regulations. The wells required by DES in their letter of June 24, 2004 have been installed and the information appears to satisfy DES' requirements.

The monitoring well required by special condition twelve in the Groundwater Management Permit, must be installed in accordance with DES regulations. Absent creditable expert testimony provided by a professional hydrogeologist on behalf of Barnhisel, there is no reason to believe that the new monitoring well will not be sufficiently deep to measure groundwater.

² Temple is not suggesting that residents are not entitled to the information. Any member of the public can obtain the information pursuant to a lawful RSA 91-A request for the information.

III. CONCLUSION

For these reasons, Barnhisel cannot and does not sustain her burden of proof with respect to the appeal. More importantly, the conclusions which she draws from the limited facts which she presents are simply not true when viewed in the entire context of the site work performed by Temple and DES. Rather, the correspondence and permitting between Temple and DES from 2002 through 2005 demonstrate a dialogue of compliance with applicable DES regulations. For these reasons, Barnhisel's appeal should be denied.

Respectfully submitted,

Town of Temple
By Its Attorneys
COOK & MOLAN, P.A.

April 7, 2006

COPY
By: 
Byron Bedard, Esq.

100 Hall Street, P.O. Box 1465
Concord, NH 03302-1465
(603) 225-3323

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was this day mailed, via first class mail, postage prepaid, to Dr. Rae Barnhisel, 161, Fish Road, Temple, New Hampshire 03084 and Anthony I. Blenkinsop, Assistant Attorney General, Office of Attorney General, Environmental Protection Bureau, 33 Capitol Street, Concord, New Hampshire 03301.

COPY

Byron Bedard, Esq.